



**I. BACKGROUND**

The facts giving rise to Plaintiff's Complaint were fully set forth in the Court's Order (Doc. 57) ruling on Defendant's Motion for Summary Judgment (Doc. 42) and need not be reiterated here. The germane facts for the pending motions concern ADOC's inmate grievance procedure and Plaintiff's alleged attempts to comply with that procedure:

An inmate who wishes to grieve the behavior of an ADOC staff member must comply with the procedure set forth in Departmental Order ("D.O.") 802.12.<sup>2</sup> Before filing a formal grievance, the inmate must attempt to resolve his complaint informally by submitting to his assigned C.O. III an Inmate Issue/Response Form within ten workdays of the action that caused the complaint. D.O. 802.08(1.1); 802.12(1.1.1). The C.O. III has a duty to investigate the complaint, and must notify the inmate by Issue/Response Form within ten days of receiving the complaint whether it can be informally resolved. D.O. 802.08(1.3.1-1.2.2). If the inmate is unsatisfied with the resolution, or if there has been no resolution, the inmate has ten days from his receipt of the Issue/Response form to file a formal grievance. D.O. 802.12(1.1.2). Grievances are logged by the Grievance Coordinator and forwarded to the Warden, Deputy Warden or Administrator, who have thirty days to review the grievance and respond. D.O. 802.12(1.1.5-1.1.6). The inmate may appeal to the ADOC Director, but must submit his appeal within ten days of receiving the response to his grievance. D.O. 802.12(1.2.1).

A grievance is considered exhausted when the ADOC Director denies the appeal. D.O. 802.12(1.2.4). If prison officials fail to respond to a grievance within the time frames specified in the departmental order, the inmate is entitled to proceed to the next level of review. D.O. 802.07(1.2.4).

---

<sup>2</sup>ADOC Departmental Order 802 is attached to Defendant's Motion to Dismiss as Attachment A.

1 Plaintiff alleges that he was injured when Defendant grabbed his testicles on April  
2 13, 2002. On May 15, 2002, well beyond the ten-day window for the filing of informal  
3 complaints, Plaintiff submitted an inmate letter in an attempt to informally resolve, among  
4 other issues, his complaint against Defendant. (Def.'s Mot. to Dismiss, Ex. C.) Plaintiff  
5 alleges that the delay in filing his informal complaint is attributable to the fact that prison  
6 officials did not supply him with the requisite forms. (Compl. at 4, ¶ 5; Doc. 15, Ex. A.)

7 C.O. III Lee investigated the informal complaint, and advised Plaintiff on the  
8 following day that the medical staff found "no evidence of injury" on his testicles. (Def.'s  
9 Mot. to Dismiss, Ex. D.)

10 Plaintiff then submitted a formal grievance on May 18, 2002. (Def.'s Mot. to  
11 Dismiss, Ex. E-1.) That grievance was returned to Plaintiff as "unprocessed" because he  
12 had not "documented [his] attempts to resolve the issue informally with [his] assigned CO  
13 III,"<sup>3</sup> and because he was "past the time frames (10 calendar days) for filing a grievance."  
14 (Def.'s Mot. to Dismiss, Ex. E.) Plaintiff did not appeal this response. He claims it is  
15 because "[t]here is no appeal for an unprocessed grievance. Without a tracking number,  
16 no appeal is accepted." (Pl.'s Resp. to Def.'s Mot. to Dismiss at 3.)

17 On July 18, 2002, Plaintiff filed a complaint with this Court naming, among others,  
18 Defendant Lao. The Complaint alleges that Defendant is liable under 42 U.S.C. § 1983  
19 for violation of Plaintiff's Eighth Amendment right to be free from cruel and unusual  
20 punishment. On June 6, 2003, Defendant filed a motion to dismiss, asserting that  
21 Plaintiff had failed to exhaust his administrative remedies prior to commencing this  
22 action (Doc. 11.) Plaintiff responded, and included an affidavit in which he stated that he  
23 "requested inmate letter forms, grievance forms, and medical forms from CB-3  
24  
25

---

26  
27 <sup>3</sup>This statement apparently refers to the fact that, according to Defendant, Plaintiff  
28 failed to attach his rejected informal complaint to his grievance. Plaintiff maintains that he  
did attach his informal complaint to his grievance.

1 correctional staff and was denied said forms." (Doc. 15, Ex. A.)<sup>4</sup> Plaintiff also maintains  
2 that he requested and was denied writing implements. (Doc. 15, Ex. A.) In lieu of a  
3 reply, Defendant withdrew his motion to dismiss but "reserve[d] the right to re-urge this  
4 basis for dismissal if discovery supports that Plaintiff failed to exhaust the prison  
5 grievance procedures. At this time, however, Defendants are not able to evaluate and  
6 respond to the documents attached to Plaintiff's response to the Motion [to Dismiss]."  
7 (Doc. 19.)

8 On August 10, 2005, Defendant filed a second motion to dismiss on the issue of  
9 exhaustion (Doc. 66). That motion, which is now pending, argues that Plaintiff failed to  
10 exhaust his administrative remedies because he did not appeal the denial of his grievance  
11 before filing his Complaint. (Def.'s Mot. to Dismiss at 5.) Plaintiff responded that any  
12 appeal would have necessarily been futile because "[t]here is no appeals process for an  
13 unprocessed grievance." (Pl.'s Resp. to Mot. to Dismiss at 3.) Defendant disagreed,  
14 replying that Plaintiff "could have resubmitted his grievance with the required  
15 information or he could have appealed the fact that his grievance returned unprocessed."  
16 (Def.'s Reply in Supp. of Mot. to Dismiss, at 2.) Defendant also asserted that "McDonald  
17 could have obtained *some* remedy from the Warden or Deputy Warden and/or from the  
18 ADC Director by appealing the Grievance Coordinator's response." (Def.'s Reply in  
19 Supp. of Mot. to Dismiss, at 2 n.3) (emphasis in original).

20 Plaintiff filed a motion to strike the statements in Defendant's reply that Plaintiff  
21 could have appealed the fact that his grievance was returned unprocessed. (Doc. 73.)  
22 Defendant responded by voluntarily withdrawing that statement, as well as the statement  
23 that Plaintiff could have obtained some remedy by appealing the response. Defendant  
24 stood by his argument that if Plaintiff had re-submitted his grievance with the informal  
25 complaint that he allegedly forgot to include with the initial submission, he could have  
26 obtained "some remedy." Defendant also contends that if the re-submission included an  
27

---

28 <sup>4</sup>Plaintiff made a similar contention in his Complaint. (Compl. at 4, ¶ 5.)

1 explanation as to why his informal complaint was untimely, "the Grievance Coordinator  
2 would have further investigated his grievance." (Def.'s Resp. to Pl.'s Mot. to Strike  
3 Statements in Def.'s Reply at 2.) In support of that argument, Defendant attached to his  
4 response a declaration by Lee, Plaintiff's then-Grievance Coordinator and C.O. III who  
5 had returned his grievance as unprocessed. (Def.'s Resp. to Pl.'s Mot. to Strike  
6 Statements in Def.'s Reply, Ex. 2 ("Lee Declaration").) Lee states that if Plaintiff had re-  
7 submitted his grievance with both the informal complaint attached and an explanation as  
8 to why his informal complaint had not been submitted within ten days of the alleged  
9 assault, she "would have reviewed the grievance more carefully to determine if he had a  
10 valid reason for being out of time frames." (Lee Declaration at 2.)

11 Plaintiff replied, and also filed a motion to strike Lee's declaration. (Doc. 80.) It is  
12 not a true motion to strike, as it simply takes issue with the factual statements in Lee's  
13 declaration. For instance, Plaintiff contends that, despite Lee's statements to the contrary,  
14 he did attach his informal complaint to his grievance, and even if he had not, Lee herself  
15 had reviewed and signed the informal complaint two days before receiving the grievance.  
16 Plaintiff also points out that when Lee returned Plaintiff's grievance as unprocessed, she  
17 violated D.O. 802.12(1.1.4), which requires her to include with the denial "instruction for  
18 proper completion." According to Plaintiff, if Lee had really wanted Plaintiff to re-  
19 submit his grievance with the informal complaint attached, she should have said so when  
20 she returned the grievance to him.

## 21 **II. LEGAL STANDARDS AND ANALYSIS**

### 22 **A. Plaintiff's Motions to Strike**

23 Both motions to strike are denied. The motion to strike certain statements in  
24 Defendant's reply in support of his motion to dismiss simply expresses Plaintiff's  
25 disagreement with Defendant's arguments. That is not a proper basis for a motion to  
26  
27  
28

1 strike.<sup>5</sup> Similarly, the motion to strike Lee's declaration does nothing more than take issue  
2 with factual assertions in that declaration. That is also not a proper basis for a motion to  
3 strike.

4 **B. Timing**

5 This lawsuit alleges that Plaintiff was a victim of Defendant's excessive force.  
6 Those allegations may or may not be true, but at a minimum, Plaintiff has been victimized  
7 by Defendant's dilatory litigation tactics.

8 This simple case was filed on July 18, 2002, over three and a half years ago. The  
9 original scheduling order imposed a dispositive motion deadline of August 29, 2003.  
10 Defendant filed its first motion to dismiss on June 6, 2003 and also asked for, and  
11 received, a stay of discovery. Defendant withdrew his motion to dismiss on July 10,  
12 2003, a new scheduling order was entered on September 8, 2003, re-setting the  
13 dispositive motion deadline to May 14, 2004. On May 14, 2004, Defendant asked that  
14 the dispositive motion deadline be pushed back one month, to June 14, 2004, and his  
15 request was granted. On the last possible day to file a dispositive motion, Defendant did  
16 so, a motion for summary judgment. Defendant asked for and received another extension,  
17 this time to file a reply in support of his motion for summary judgment. The motion for  
18 summary judgment was denied in part, and yet again, Defendant asked for an extension,  
19 this time of one-hundred twenty days to file the joint pretrial statement. That was not  
20 enough, and Defendant asked for, and received, a further sixty day extension.

21 Glaringly absent from this string of extensions is a request to file a dispositive  
22 motion after June 14, 2004. Apparently, Defendant felt that he did not need permission to  
23 file such a motion, because he did file one without permission, about *fifteen months* after  
24 the dispositive motion deadline had passed.

---

27 <sup>5</sup>Federal Rule of Civil Procedure 12(f) authorizes courts to strike from any pleading  
28 "any redundant, immaterial, impertinent, or scandalous matter."

1 But it does not end there. The Court is unaware of a case, and Defendant has not  
2 pointed out any, where a defendant has been permitted to file a motion to dismiss on the  
3 issue of exhaustion more than six months after a motion for summary judgment. Courts  
4 are generally hesitant to allow exhaustion issues to be raised even at the summary  
5 judgment phase, but do so when there has not been an allegation of prejudice. *See*  
6 *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 952 (9th Cir. 2005) (citations omitted)  
7 (citing *Paine v. City of Lompoc*, 265 F.3d 975, 981 n.1 (9th Cir. 2001)). Here, Plaintiff  
8 has correctly alleged that he has been prejudiced by this motion's tardiness.

9 Next, when Defendant learned of the basis for Plaintiff's opposition to the original  
10 motion to dismiss, Defendant withdrew the motion because he needed to conduct more  
11 discovery to adequately respond. Defendant promised the Court that he would re-urge the  
12 motion to dismiss only if discovery supported it. Discovery did not support it, as  
13 Defendant's pending motion to dismiss does not rely on any facts obtained in discovery.  
14 Moreover, even if Defendant had somehow obtained an affidavit from the guards that  
15 they had not withheld the grievance forms from Plaintiff, such an affidavit would have  
16 been insufficient to overcome at that stage of the litigation Plaintiff's affidavit concerning  
17 what the guards had allegedly done. In other words, even at the time that Defendant  
18 withdrew his motion, it appears impossible that discovery could have yielded evidence  
19 that would have supported a dismissal for failure to exhaust.

20 The delay is also needless because there is no fathomable reason why, if Defendant  
21 wished to press the exhaustion issue, he could not have at least attempted to do so in his  
22 motion for summary judgment. By that point, the discovery deadline had well passed.  
23 And finally, as will be discussed below, the delay is especially needless because the  
24 motion is baseless.

### 25 C. Exhaustion

26 Section 1997e of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e,  
27 provides that, "No action shall be brought with respect to prison conditions under Section  
28 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or

1 other correctional facility until such administrative remedies *as are available* are  
2 exhausted." (emphasis added).

3 "[A] remedy that prison officials prevent a prisoner from utilizing is not an  
4 'available' remedy under § 1997e(a)." *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001)  
5 (citations and some internal punctuation omitted). *See Mitchell v. Horn*, 318 F.3d 523,  
6 529 (3d Cir. 2003) (denying motion to dismiss for failure to exhaust where prison  
7 officials refused to provide inmate with necessary grievance forms, and as such, finding  
8 that the inmate lacked "available" administrative remedies); *O'Connor v. Featherston*,  
9 2002 WL 818085, at \*1-2 (S.D.N.Y. April 29, 2002) (noting that "courts have held that  
10 an inmate may nonetheless defeat a motion to dismiss even when the requirements of  
11 administrative remedies have not technically been exhausted where . . . it is alleged that  
12 corrections officers failed to file inmate's grievances or otherwise impeded or prevented  
13 his efforts") (citations omitted). *See, e.g., Johnson v. Wackenhut Corrs. Corp.*, 130  
14 Fed.Appx. 947, 950 (10th Cir. 2005) (acknowledging that "courts have held that refusing  
15 a prisoner grievance forms could raise an inference that the prisoner has exhausted  
16 'available' administrative remedies"); *Vega v. U.S. Dep't of Justice*, 2005 WL 2931841, at  
17 \*2 (M.D. Pa. Nov. 4, 2005) (acknowledging the rule that where prison officials "mislead"  
18 or "otherwise prevent" an inmate from filing a timely grievance, inmate may be justified  
19 in "not complying with administrative procedural requirements") (citing *Brown v. Croak*,  
20 312 F.3d 109, 112-13 (3d Cir. 2002)); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir.  
21 2002); *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001). *Cf. Frank v. Days*, 322 F.3d 863,  
22 867 (5th Cir. 2003) (holding that where injury prevented inmate from filing his grievance  
23 in a timely manner, action could not be dismissed due to failure to exhaust, because, in  
24 light of the inmate's injury, no remedies were "available" to him).

25 One way that prison officials can prevent an inmate from utilizing a remedy is by  
26 denying him access to the requisite grievance forms until the window for filing  
27 grievances has passed. *Miller*, 247 F.3d at 739-40 (denying motion to dismiss for failure  
28 to exhaust where inmate had attempted to obtain administrative forms for filing a



1 grievance but prison officials had refused to respond); *Mitchell*, 318 F.3d at 529 (citing  
2 *Miller*, 247 F.3d at 740); *O'Connor*, 2002 WL 818085, at \*1-2. *See also Johnson*, 130  
3 Fed.Appx. at 950.

4 In those situations, an inmate's administrative remedies can be considered  
5 exhausted "without his claims being denied at the highest level of administrative review  
6 specified by the relevant prison policies." *Davis v. Arpaio*, 2006 WL 269964, at \*2 (D.  
7 Ariz. Jan. 31, 1996) (citing *Mitchell*, 318 F.3d at 529; *Miller*, 247 F.3d at 740). *See also*  
8 *Adkins v. Arpaio*, 2006 WL 269965, at \*2 (D. Ariz. Jan. 31, 2006) (citations omitted);  
9 *Cordova v. Arpaio*, 2005 WL 3560621, at \*1 (D. Ariz. Dec. 29, 2005); *Neese v. Arpaio*,  
10 397 F. Supp. 2d 1178, 1183 (D. Ariz. Nov. 9, 2005). *See, e.g., Henderson v. Macias*,  
11 2005 WL 2709523, at \*3 (E.D. Cal. Oct. 20, 2005) (holding that "exhaustion occurs when  
12 prison officials fail to respond to a grievance within the policy time limits," and citing  
13 supporting cases from the Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits)  
14 (citations omitted); *Ellis v. Cambra*, 2005 WL 2105039, at \*4 (E.D. Cal. Aug. 30, 2005)  
15 (citations omitted); *Rowe v. Corcoran State Prison*, 2005 WL 1344379 (E.D. Cal. May  
16 27, 2005).

17 Here, Plaintiff has alleged that despite numerous requests, prison officials refused  
18 to provide him with the forms used to initiate the grievance process until the ten-day  
19 window for timely filing such grievances had passed. (Compl. at 4, ¶ 5; Doc. 15, Ex. A;  
20 Pl.'s Resp. to Def.'s Mot. to Dismiss at 3-4; Pl.'s Resp. to Def.'s Notice of Supplemental  
21 Authority at 2; Pl.'s Mot. to Strike Decl. of Antonette Lee at 2.) Defendant provides no  
22 evidence or argument to the contrary. Accordingly, because it is uncontested that prison  
23 officials denied Plaintiff timely access to all available remedies, it cannot be said that he  
24 failed to exhaust "available" remedies.

25 Defendant argues that even assuming prison officials impeded Plaintiff's access to  
26 the grievance forms, Plaintiff's case should still be dismissed because he failed to appeal  
27 the denial of his grievance. This argument is rejected in light of the above authority and  
28 because even if Plaintiff had appealed, it was not possible for him to succeed, or for

1 prison officials to take any action on Plaintiff's grievance. *See Booth v. Churner*, 532  
 2 U.S. 731, 736, 121 S. Ct. 1819, 1822-1823 n.1 (2001) (implicitly acknowledging that no  
 3 remedy is "available" where "the relevant administrative procedure lacks authority to  
 4 provide any relief or to take any action whatsoever in response to a complaint" because  
 5 "without the possibility of some relief, the administrative officers would presumably have  
 6 no authority to act on the subject of the complaint, leaving the inmate with nothing to  
 7 exhaust."); *Brown v. Valoff*, 422 F.3d 926, 929 (9th Cir. 2005) ("[T]here can be no  
 8 'absence of exhaustion' unless *some* relief remains available") (citing *Brown v. Croak*, 312  
 9 F.3d 109, 112 (3d Cir. 2002)). D.O. 802 is unequivocal on this point: "Failure to submit  
 10 [an informal complaint] within ten working days of the action that caused the complaint  
 11 *shall* result in the inmate's forfeiture of the opportunity to pursue a formal grievance  
 12 through the Department's Inmate Grievance system." D.O. 802.08(1.1.1) (emphasis  
 13 added). There is no provision in D.O. 802 that permits prison officials to consider a  
 14 grievance if the informal complaint is untimely.<sup>6</sup> *See Brown*, 422 F.3d at 926 (noting that  
 15 "requiring *entirely* pointless exhaustion, when no possible relief is available, is more  
 16 likely to inflame than 'mollify passions'" (quoting *Booth*, 532 U.S. at 737, 121 S. Ct. at  
 17 1825) (emphasis in *Brown*).

---

18  
 19  
 20 <sup>6</sup>Defendant disputes the fact that Plaintiff had no remedy available to him. In his  
 21 response to Plaintiff's motion to strike certain statements in Defendant's reply, Defendant  
 22 states that Plaintiff "could have obtained *some* remedy if he had resubmitted his grievance  
 23 with the required information." (Def.'s Resp. to Pl.'s Mot. to Strike Statements in Def.'s  
 24 Reply in Supp. of Mot. to Dismiss at 2.) Not so. Had Plaintiff submitted the "required  
 25 information," which was apparently a copy of the informal complaint, that submission would  
 26 not have affected the second reason stated in the response for denying Plaintiff's grievance:  
 27 the fact that his informal complaint was filed more than ten days after the alleged assault.  
 28 Even though Lee's declaration states that if Plaintiff had re-submitted his grievance with the  
 informal complaint attached, she "would have investigated the matter further," that statement  
 is inconsistent with her duty to comply with D.O. 802, which does not provide any prison  
 official with the authority to investigate untimely informal complaints. Also, despite faulting  
 Plaintiff for not re-submitting his grievance, Lee violated D.O. 802.12(1.1.4), which requires  
 her to return unprocessed grievances "with instruction for proper completion."

As a final note, the Court does not believe it is necessary to withhold ruling on this motion until the United States Supreme Court renders its decision in the case of *Ngo v. Woodford*, 2005 WL 3027720 (Nov. 14, 2005), which presents the question, answered in the affirmative by the Ninth Circuit, 403 F.3d at 620, whether "a prisoner satisf[ies] the Prison Litigation Reform Act's administrative exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal[.]" While the inmate in *Ngo*, like Plaintiff, failed to file a timely informal complaint,<sup>7</sup> there is no allegation in *Ngo* that the reason for the delay was attributable to factors outside of his control, such as prison guards actively impeding inmate access to the grievance forms. As such, the Court believes that however the Supreme Court may rule in *Ngo*, it would not have an impact on the present action.

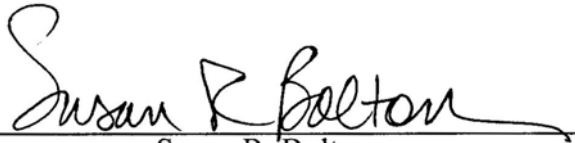
**IT IS ORDERED** denying Defendant Lao's Motion to Dismiss (Doc. 66).

**IT IS FURTHER ORDERED** denying Plaintiff's Motion to Strike certain statements in Defendant's Reply in Support of his Motion to Dismiss (Doc. 73).

**IT IS FURTHER ORDERED** denying Plaintiff's Motion to Strike the Declaration of Antoinette Lee (Doc. 80).

**IT IS FURTHER ORDERED** that the Joint Proposed Pretrial Order is due in thirty days. No extensions will be given. Defendant has the responsibility to communicate with Plaintiff regarding the preparation of that Order.

DATED this 16<sup>th</sup> day of February, 2006.

  
 Susan R. Bolton  
 United States District Judge

---

<sup>7</sup>While the untimely grievance in *Ngo* is referred to as an "appeal," it is procedurally and substantively equivalent to the informal complaint that ADOC inmates are required to file in order to commence the inmate grievance process.